Filed 12/6/16 In re E.V. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.V., et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	E065783 (Super.Ct.No. J261935) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

Mother appeals from the order of the juvenile court denying her request to change a court order. (Welf. & Inst. Code, § 388.)[1] Mother and her six children have been involved in multiple juvenile dependency proceedings since June 2009. Two children, C.V. and E.V., born in 2010 and 2012, are the subjects of this appeal. No other parent is a party to the appeal. The trial court denied the mother's section 388 petition on March 30, 2016. We affirm the judgment.[2]

II

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background covering the period from September through December 2015 was set forth in a previous writ proceeding, *J.M. v. Superior Court*, E064991:

"On September 4, 2015, the San Bernardino County Department of Children and Family Services (CFS) filed a petition on behalf of the children. E.V. was three years old at the time, and C.V. was four. The petition alleged that the children came within section 300, subdivisions (b) (failure to protect), (g) (no provision for support), and (j) (abuse of sibling). Specifically, the petition alleged that mother and the children's alleged father

[1] All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

[2] We deny mother's request for judicial notice filed July 18, 2016, and opposed by respondent.

(father) had substance abuse problems that interfered with their ability to parent. The petition further alleged that mother exposed the children to marijuana and cannabis extracting chemicals that she kept in the home, within their reach, and that father knew or reasonably should have known that the children were at risk of abuse and/or neglect if left in her care. The petition also alleged that mother was currently incarcerated and unable to make arrangements for the care of the children, and that father's whereabouts were unknown. In addition, the petition alleged that mother and father received reunification services for the children's half-siblings, T.V., S.V., N.V., and J.V., but failed to reunify. Their reunification services were terminated, and their parental rights were terminated on December 14, 2010. Those four children were subsequently adopted.

"The social worker filed a detention report on or around September 8, 2015. The social worker reported that a police officer went to mother's home with a probation officer to do a probation check on mother's boyfriend, J.M. He was not home, but they conducted a probation search of the home and found marijuana and extracted cannabis in a drawer that was within reach of the children. They also found chemicals that were consistent with those used to extract cannabis. There were several mason jars full of marijuana and about 110 small containers of extracted cannabis. Mother was arrested for child endangerment and drug sales. The social worker spoke with mother, who denied that the chemicals were within reach of the children, since they were downstairs, and the children did not go downstairs.

"The court held a detention hearing on September 8, 2015, and detained the children in foster care.

"*Jurisdiction/Disposition Report and Hearing*

"The social worker filed a jurisdiction/disposition report on September 25, 2015, recommending that mother not be provided with reunification services and that a section 366.26 hearing be set. The social worker reported on mother's and father's previous dependencies. A section 300 petition was filed in Ventura County on June 26, 2009, with regard to their children, N.V., S.V., and T.V. Then, on January 7, 2010, a petition was filed on behalf of their child, J.V. The petitions included the allegations that mother had a significant history of substance abuse, and father had histories of alcohol abuse and violent and aggressive behavior. The petitions also alleged that mother and father had failed to provide appropriate care and supervision and had a history of unstable housing. Mother and father received 12 months of reunification services, but failed to progress. The court terminated services and set a section 366.26 hearing. Parental rights were terminated on December 14, 2010, and the four children were adopted on June 27, 2011.

"Then, in December 2010, mother had a fifth child, C.V., in Los Angeles County. He was taken into protective custody a few days after birth. A jurisdiction/disposition hearing was held on February 4, 2011, and C.V. was returned to mother under a plan of family maintenance. By the time of the six-month review hearing on January 24, 2012, mother completed her family maintenance services, and the case was closed.

"The social worker interviewed mother on September 14, 2015, regarding the current allegations. Mother said she began using methamphetamine when she was 13 years old, but stopped when she was 18. She admitted currently using marijuana for pain, as she said she tested positive for 'pre-cervical cancer'. She reported that she was living

with her boyfriend, J.M., before, but he no longer lived with her. He was arrested a year ago, and she believed that maybe some of the jars of marijuana and extraction tools found in her home were 'left over from that time.' Mother admitted that the marijuana found in her bedroom was hers, though. When asked about domestic violence, mother said that father used to hit her, but she did not engage in physical altercations with her current boyfriend, J.M.

"The social worker also interviewed J.M. He said that he and mother moved in together about two or three years ago. When asked if E.V. was his son, he said he was not sure, since mother was sleeping with other men at the time E.V. was conceived. Regarding his criminal history, J.M. said he was arrested a year prior for manufacturing cannabis for a dispensary. He believed that what he was doing was legal, and he did not believe he was endangering the children in the home. J.M. said he no longer lived with mother.

"The social worker received a police report indicating that J.M. did live in the home with mother. When the probation officer searched the home, J.M.'s clothing and personal items were found in the bedroom. Also, marijuana was found in unsecured plastic grocery bags, in mason jars, and in Tupperware—all within reach of the children.

"The social worker interviewed the children, as well. She asked C.V. what it was like living with his mother, and he said, 'My mom is in jail because of grass. She had pot, she smokes it.' When shown pictures of the jarred marijuana that was removed from mother's home, C.V. said, 'That's pot . . . [J.M.] makes it.' When asked if J.M. lived in their home, he said, 'Yeah, he lives there. He sleeps with my mom but I don't like [him]

because he spanks me and [E.V.] with a belt and I cry and cry.' E.V. agreed that J.M. hit him hard with a belt, and hit him on his face. C.V. said that J.M. also hit mother 'all of the time.' Both children said they were afraid of J.M.

"The social worker interviewed the children's foster mother, and she reported that they were very aggressive children who hit each other often. The foster mother believed they were exposed to a lot of violence in the home because they repeated 'violent things that they have heard.' She said C.V., age four, cursed at other children in the home and threatened to kill them when angry. The social worker recommended that mother not receive reunification services, as she had 'blatantly repeated the same patterns which led to her four other children's removal.'

"In late September 2015, the social worker filed amended section 300 petitions for the children, adding allegations under section 300, subdivisions (a) and (b), that mother allowed her live-in boyfriend, J.M., to strike the children with a belt, and that J.M. had a substance abuse problem and exposed the children to marijuana.

"The social worker filed an addendum report on November 3, 2015, and noted that the children frequently talked about how mother and J.M. smoked weed and how J.M. hit mother on multiple occasions. The social worker further reported that both C.V. and E.V. had been 'acting out.' C.V. threw an extreme temper tantrum during an interview, when he could not take a toy home with him. He threw himself on the ground and screamed, and he kicked at people who tried to approach him. The social worker reported that mother often made things worse because she was 'all over the place.' She was 'incredibly hyper,' talked fast, and was scattered. The social worker continued to

recommend no reunification services because she did not believe they would have any effect on 'already engrained patterns of abuse.' The social worker noted that mother had participated in two separate reunification plans. She failed to have her children returned to her in the first case, and her parental rights were terminated. C.V. was returned to her care in the second case, after she completed both a family maintenance and reunification plan. However, despite successfully completing counseling, a drug treatment program, and a domestic violence program, mother immediately entered into another violent relationship with J.M. and returned to her drug use. She also had drug manufacturing occurring in her home. The social worker observed that mother could stay clean when monitored by CFS, but would return to drugs, violence, and criminal activity when CFS supervision was withdrawn.

"The court held a contested jurisdiction/disposition hearing on December 10, 2015. Mother testified on her own behalf. She denied allowing her boyfriend, J.M., to hit the children with a belt and said she would never allow anyone to hit her children. When confronted with the fact that E.V. disclosed that both she and J.M. hit him with a belt, she still denied it. She claimed E.V. only said that because his older brother, C.V., said it. She added that C.V. only said he had been hit with a belt because he wanted some attention. Mother admitted she was smoking marijuana, but said she had a medical prescription to do so. Furthermore, she denied the allegations that she had marijuana and cannabis extracting materials in the home, within the children's reach. She said those items were kept in the basement. She said she would go down into the basement to smoke marijuana, while the children were upstairs watching television. When confronted

with the fact that the police found some of those items in the bedrooms, mother said they were high up in a closet. She further denied there was any domestic violence going on in the home or in her relationship with J.M. As to her previous dependency cases, she admitted that her four other children were never returned to her custody, but were adopted. As to her previous case with C.V., she completed her case plan and was given full custody of C.V. Mother testified that she was currently enrolled in services, including a parenting program, relapse prevention, drug education, a family support group, an outpatient program, a domestic violence batterer's treatment program, and a child endangerment program. She said she completed an anger management program. She was also attending Narcotics Anonymous. When asked why there was so much marijuana in her home, mother simply said she would 'buy in bulk because it's a lot cheaper . . . .'

"Mother further testified that she did not believe the children were afraid of J.M. She said she stopped being in a relationship with him two weeks prior, and that she was only in a 'friendship relationship' with him now. She said she had no plans to get back together with him. Mother testified that she and the children were currently living in J.M.'s mother's home, and she planned on continuing to live there to take care of his mother. Mother said J.M. did not live with them. She further testified that she was dependent on J.M.'s mother since she took care of her, in exchange for living in her home. Mother had no relatives and nowhere else that she could reside. She said that when she eventually got her children back, she would have to get a part-time job and move because she believed J.M.'s mother planned on moving. Mother was not currently

looking for a job. She just wanted to get certificates from her classes and then probably pursue her GED, so she could go to photography school.

"After hearing closing arguments from counsel, the court acknowledged that mother had clearly made some efforts in her case plan and had been testing clean. However, it did not believe there had been any 'actual change going on.' Rather, the court believed she had only made 'a temporary change just to do what she has to do to get the kids back.' The court noted that in her relationship with J.M., mother told him just two weeks prior that their relationship was over; however, she was still deeply entrenched with his family and had no one else. The court did not expect perfection or complete change from mother immediately; however, it sensed that mother lacked credibility in some areas and just 'painted a picture' to try and get the children back. The court noted that, if this had been mother's first dependency case, they would be discussing reunification services. However, since this was her third case, and 'this has been done before,' the court did not see sufficient efforts. The court sustained the petition and declared the children dependents. It also adopted the findings in the jurisdiction/disposition report, including that there was clear and convincing evidence that reunification services for N.V., S.V., T.V., and J.V. were terminated and mother's parental rights were permanently severed, and that mother had not subsequently made a reasonable effort to treat the problems that led to their removal. The court denied reunification services and set a section 366.26 hearing." (E064991, pp. 2-10.)[3]

[3] Mother's writ petition was denied by this court on March 15, 2016.

In February 2016, the two boys were placed in Ventura County with the same family who is adopting the two older siblings.

On February 29, 2016, mother filed a section 388 petition, asking the court to change its order and to grant reunification services and increased visitation. In support of her request, mother asserted that she had completed substance abuse programs and tested negatively for drug use. She had also completed an anger management course and was attending parenting and family support groups. She claimed she had been diligent in participating in successful visitation with the children.

In an interim review report, CFS recommended the court deny the petition. While in foster care, the children's behavior had improved at home and in school. The children were much happier and demonstrated a stronger attachment to their foster parents and their siblings than to their mother. C.V. had told CFS he did not want to return to mother and he wished to stay in his foster placement. C.V. became hysterical and screamed during a visit with mother. E.V. cried for the foster mother when he saw mother.

In the meantime, mother's boyfriend, J.M., had died of a drug overdose. Mother resisted attending CFS-recommended programs and continued to be uncooperative with CFS. CFS asserted mother had not made substantive progress and it would be detrimental to increase visitation, to remove the children from the foster home, or to provide reunification services.

The court ruled mother did not show a change of circumstances and the boys' best interests would not be served by the court granting the petition. The court denied the petition.

III

DISCUSSION

The juvenile court may exercise its discretion to deny a section 388 petition hearing when the moving party has not met her threshold burden of proof. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) The court's ruling should not be disturbed unless an abuse of discretion is clearly established. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Section 388 provides, in relevant part, as follows:

"(a)(1) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court . . . . The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order . . . ." (§ 388, subd. (a)(1).)

The petitioner must make a prima facie showing to trigger the right to a hearing. (§ 388, subd. (d); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; Cal. Rules of Court, rule 5.570(h).) The two-part prima facie showing, includes: (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432; § 388, subd. (d).)

We hold mother did not demonstrate that her circumstances changed and that granting her section 388 petition served the boys' best interests. The juvenile court properly denied her petition.

As to changed circumstances: "The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order." (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) A parent's history is "a good predictor of future behavior." (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.) In this case, family reunification (FR) services were bypassed because mother resisted reform, which had previously resulted in termination of her FR services and parental rights. Under these circumstances, it was unlikely that mother could successfully reunify with these two children.

This is mother's fourth dependency case involving young children. After C.V. was detained after birth, mother initially reunified with him but she has continued to repeat the same patterns which led to removal of her four other children. Mother has a history of substance abuse and exposing her children to violent substance-abusing men. Mother has failed to benefit from services.

As stated previously, mother began using methamphetamine at the age of 13. She used marijuana for precervical cancer, stress and anxiety. In particular, mother was involved with J.M. who was arrested for manufacturing drugs. Their home was a drug den of marijuana, concentrated cannabis/hash oil, and drug-cooking and extracting materials—accessible to the children.

In September 2015, CFS initiated this dependency. The social worker observed that mother had tended to engage in services but returned to drugs, violence and criminal activity when CFS supervision was withdrawn. C.V. and E.V. had been exposed to drugs and domestic violence between mother and J.M. Mother had allowed J.M. to hit the boys with a belt, causing injuries.

Mother's section 388 petition, filed in February 2016, reflected nothing more than "changing" circumstances regarding her substance abuse, as suggested by her trial counsel. A petition alleging merely changing circumstances does not promote stability or the child's best interests. (*In re Edward H., supra*, 43 Cal.App.4th at p. 594.)

Mother's petition asserted she had completed substance abuse treatment on January 15, 2016, tested negative, and attended aftercare and AA/NA meetings. However, the petition did not reflect random testing procedures or the substances detected in the testing, and failed to confirm mother had attended all random tests. Mother reportedly tested on seven dates, between December 22, 2015, and February 11, 2016. However, she did not provide random test results from September until December 22, 2015 or from February 11 to March 30, 2016, the date of the section 388 hearing. Mother's section 388 petitions were facially insufficient to demonstrate a prima facie case.

In CFS's view, mother's attendance at anger management and parenting classes also did not reflect changed circumstances. Mother tended to complete programs to obtain a certificate, not because she sincerely wished to reform for the boys' sake.

In re Anthony W. (2001) 87 Cal.App.4th 246, 250-252, the court held it was not an abuse of discretion to deny the mother a section 388 hearing where her assertions supporting the petition were conclusory. Here, mother relied on conclusory statements that she benefited from services. A parent must demonstrate risks to a child were alleviated by participating in services, and by making substantive progress in services, which mother failed to do. This case involved much more than substance abuse. Mother—with extensive Child Protective Services and criminal history—engaged in domestic violence and failed to protect her children from physical violence. There was little reason to believe mother would be more successful in the future.

As for the best interests component: it was not in the children's best interests for mother to receive FR services and liberalized visits. The issues presented were serious and longstanding, an important consideration when assessing the best interest question in a section 388 petition by a parent seeking FR services. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) Furthermore, the children had bonded with their caretakers. CFS reported "The children are in a loving home and their behaviors have decreased . . . . " "The children are happy, improving in school, attend church, and are attached to the foster parents and have stopped cursing as frequently." C.V. and E.V. are happy when they see their foster parents and their siblings. Substantial evidence supported the conclusion that removal from foster care would be detrimental to the boys and FR services to mother would not serve their best interests.

The boys' permanence and stability is the required focus for the boys at this juncture. (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.) Childhood cannot wait

indefinitely for a parent to establish readiness for parenting. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) *In re Angel B.* (2002) 97 Cal.App.4th 454, 465, states: "[T]here is a rebuttable presumption that, in the absence of continuing reunification services, stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers. . . . To rebut that presumption, a parent must make some factual showing that the best interests of the child would be served by modification." CFS is working diligently to facilitate the preferred plan of adoption. A legal guardianship is also a viable secondary option. (§ 366.26, subd. (b).) Under these facts, it cannot be said that the court abused its discretion in denying mother's section 388 petition.

IV

DISPOSITON

The juvenile court did not abuse its discretion in denying mother's section 388 petition, which failed to present a prima facie case.

We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.